Nos. 79-377, 79-378 and 79-379

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In the Supreme Court of the United States

OCTOBER TERM, 1979

DOW JONES & COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

MAGAZINE PUBLISHERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

UNITED STATES POSTAL SERVICE

AMERICAN BUSINESS PRESS, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A95)[1] is not yet reported. The decision of the Governors of the United States Postal Service (Pet. App. B4-B9) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1979. The petitions for a writ of certiorari were filed on August 31, 1979 (No. 79-377) and September 6, 1979 (Nos. 79-378 and 79-379). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the postal rates and fees recommended by the Postal Rate Commission and approved by the Governors of the Postal Service are consistent with the Postal Reorganization Act of 1970, 39 U.S.C. 101 *et seq.*

STATEMENT

This action arises out of the most recent general postal rate proceeding conducted by the Postal Rate Commission (Commission). The Commission's decision recommending new rates was approved by the Governors of the Postal Service (Governors), whose decision was affirmed by the court of appeals. Petitioners seek review of that judgment.

To place in perspective the questions that petitioners present and the position of the Postal Service, we first summarize the statutory framework and prior litigation in this area. When Congress enacted the Postal Reorganization Act, 39 U.S.C. 101 *et seq.* (the Act), in 1970, it relinquished the control it had traditionally exercised over the setting of postal rates and fees and the establishment of mail classes. Instead, it established the United States Postal Service (USPS) and the Commission as agencies independent of each other, each with a role in setting rates.

Under 39 U.S.C. 3622, the Postal Service initiates a rate proceeding by requesting the Commission to recommend changes in rates or fees when "the Postal Service determines that such changes would be in the public interest." The Postal Service submits proposed rates with its request. *Ibid.* After receiving the request, the Commission holds hearings on the proposed rates (39 U.S.C. 3624(a)) and then recommends a decision to the Governors (39 U.S.C. 3624(d)). The Governors may approve a decision recommended by the Commission, allow it under protest, reject it, or (in certain circumstances) modify it (39 U.S.C. 3625). A decision of the Governors that orders rates into effect may be appealed to any court of appeals by "an aggrieved party who appeared in the proceedings under [39 U.S.C.] 3624(a)" (39 U.S.C. 3628).

The Commission does not possess unfettered discretion in arriving at the rates it recommends to the Governors. 39 U.S.C. 3622(b) specifies nine considerations—in addition to the more general one of "the policies of [the Act]"—which must guide the Commis-

[1] "Pet. App." refers to the petition in No. 79-378.

sion in recommending changes in rates and fees. These factors reflect the breadth of Congress' concerns. There are eight "non-cost" factors (*e.g.*, the availability of other means of communication; the effect on competing enterprises; the social, cultural, and educational value of the mail) and, of particular relevance here, one "cost" factor: "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type" (39 U.S.C. 3622(b)(3)).

The postal rate proceeding involved in this case is the fourth such proceeding conducted by the Commission under the Act. Although each of the four proceedings established rates and fees for dozens of mail subclasses and special services, the four proceedings are most conveniently identified by the rate each established for the first ounce of first-class mail. The first proceeding, which established the eight-cent rate, was Docket No. R71-1. The United States Court of Appeals for the District of Columbia Circuit reviewed the Governors' decision and affirmed it. *Association of American Publishers, Inc.* v. *USPS*, 485 F.2d 768 (D.C. Cir. 1973).

The second proceeding, Docket No. R74-1, established the 10-cent rate. The National Association of Greeting Card Publishers (NAGCP) sought statutory review in the court of appeals. While that case was under consideration, the Commission was con-

sidering the third rate case, Docket No. R76-1, which involved a 13-cent rate. The Governors adopted the 13-cent rate recommended by the Commission on July 7, 1976. NAGCP sought review of that proceeding in the court of appeals, which was still considering NAGCP's appeal from the second (10-cent rate) proceeding.

The court of appeals issued its decision in the 10-cent rate proceeding on December 28, 1976. *National Association of Greeting Card Publishers* v. *USPS*, 569 F.2d 570 (D.C. Cir.), vacated as to other issues, 434 U.S. 884 (1977) (*NAGCP I*). The court recognized that the superseding 13-cent and related rates had been in place for five months but found that NAGCP's original appeal was not moot. The court concluded that the question was "capable of repetition, yet evading review" and held that the case or controversy prerequisite to federal jurisdiction was satisfied. 569 F.2d at 578 n.21; Pet. App. D14-D15 n.21.

On the merits, the court rejected the costing and pricing methodologies that the Postal Service and the Commission used to differentiate "attributable" and "assignable" costs under 39 U.S.C. 3622(b)(3). See 569 F.2d at 580-593; Pet. App. D18-D47. In brief, the court found that the cost-variability approach they used resulted in "attributing" an insufficient amount of costs (52.5%). As the court of appeals explained (569 F.2d at 583; Pet. App. D26; footnote omitted):

> Whereas the linchpin of the cost variability approach is an abiding concern for the greatest possible accuracy in measuring causation, the * * * approach [of the Administrative Law Judge that the Commission and the Governors rejected] devalues somewhat the interest in utmost accuracy in order to pursue more fully the goal of maximized attribution. Simply put, the alternative approach relies on cost accounting principles to augment the inferences of causation derived through use of the cost variability theory. Additional attribution results from using distribution keys such as weight, volume and number of pieces of mail to apportion among the postal services affected those cost segments which clearly affect more than one service and which, although not measurably variable on presently available data, are reasonably susceptible to such apportionment.

The court concluded that "the Act requires that special efforts be made to maximize the use of cost-of-service principles in the allocation of postal costs" (569 F.2d at 587; Pet. App. D35). However, because the 10-cent and related rates in *NAGCP I* had been superseded by the 13-cent and related rates some time before the *NAGCP I* decision issued, the court took no action to disturb the existing rates.

The Postal Service initiated the present proceeding, proposing a 16-cent rate, on July 13, 1977, some six months after *NAGCP I* was decided, by filing a request for a recommended decision with the Commission. On May 19, 1978, the Governors accepted the recommended decision of the Commission, ordered a

15-cent rate and related rates into effect, and terminated the administrative phase of the case. The Postal Service then moved the court of appeals to dismiss *NAGCP II* (13-cent rate) for mootness, and the court did so on June 27, 1978. *National Association of Greeting Card Publishers* v. *USPS*, No. 76-1611 (D.C. Cir.) (*NAGCP II*). NAGCP meanwhile initiated the present case—*NAGCP III*—by filing a petition for review of the Governors' May 19, 1978, decision. The court of appeals affirmed the Governors' decision (Pet. App. A2-A95), and the present petitions for a writ of certiorari followed.

ARGUMENT

1. The Postal Service believes that the approach that the court of appeals dictated in *NAGCP I* and adhered to in the present case is mistaken. Its position may be summarized as follows.

In the first two ratemaking proceedings following reorganization, USPS and the Commission interpreted 39 U.S.C. 3622(b)(3) as requiring USPS to allocate costs to classes of mail and types of service in two—and only two—steps: first, it must allocate those costs that are "attributable," either directly or indirectly, to a class of mail or type of service—that is, costs that are causally related to the service provided; and second, it must make a reasonable assignment, among classes of mail, of *all* other costs. The court of appeals, however, stated in *NAGCP I* that there is, in effect, a third category of costs: "Congress did not intend that *all* postal costs be either

attributed or assigned. * * * [S]ome Postal Service costs will exist but will not be 'reasonably assignable' to any particular class or type. The other factors enumerated in section 3622 will govern the allocation of these nonattributable and nonassignable costs." 569 F.2d at 587; Pet. App. D34 (emphasis in original). Thus, the third category comprised some of the costs that the Postal Service had previously included in the second—non-attributable—category of costs; conceptually the court made them merely an extension of attributable costs.[2]

The court explained this result by stating, first, that all costs that could be determined, through reasonable inferences of causation, to be the consequence of providing a service must be attributed to that service. Then, as to the new conception of costs that it announced, the court said that a portion of remaining costs must be assigned to the various classes of mail "to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs." 569 F.2d at 586; Pet. App. D32. The court, attempting to distinguish between attributable costs and its new definition of assignable costs, said that while both involved "inferences of

[2] As a result, in the instant rate proceeding more than $1 billion in postal costs were distributed to classes of mail on the bases of inferences that are lawful under *NAGCP I*, but that involve considerably more judgment and estimation than the Commission or the Postal Service, in the exercise of their expertise, had considered to be appropriate under the Act. In future ratemaking proceedings, appreciably larger amounts of postal costs can be expected to be distributed to the classes of mail on the bases of such inferences.

causation," assignable costs permit "a greater degree of estimation" and connote "somewhat more judgment and discretion." 569 F.2d at 587 n.59; Pet. App. D34 n.59. Finally, the court held that it is only the residuum of costs that is subject to discretionary allocation in accordance with the eight non-cost (pricing) factors of Section 3622(b). 569 F.2d at 592; Pet. App. D46.

The court of appeals reached these conclusions because it regarded Section 3622(b)(3) as "strengthened from a guideline into the only 'requirement'" among the rate-setting factors in Section 3622. 569 F.2d at 588; Pet. App. D34.[3] The court relied on its reading of the legislative history to reinforce its conclusions. The Postal Service believes that a more accurate analysis of the legislative history is contained in the petition filed by Magazine Publishers Association, Inc., and Time Incorporated (see 79-378 Pet. 18-26), and that this history demonstrates that the court of appeals in *NAGCP I* misconstrued the Act.

The Postal Service believes, contrary to the court of appeals, that the language and history of the Act demonstrate that Congress envisaged only two types of postal costs: "attributable" costs, which are causally related to the service provided, and *all* other

[3] In a separate opinion, Judge MacKinnon criticized the majority for having over-emphasized cost of service as the basis for rates and having "read out of existence" the non-cost factors that Congress had included in Section 3622(b). 569 F.2d at 603, 606; Pet. App. D72, D77-D78 (MacKinnon, J., concurring).

costs, which are to be "assigned" to classes of mail on a reasonable, value-of-service basis, determined by the non-cost factors of Section 3622(b). The court of appeals has held that, after attributable costs are allocated, remaining costs that can "reasonably" be assigned to various mail classes, on a cost-of-service basis, are to be so assigned. Only those costs that cannot be reasonably assigned on a cost-of-service basis are to be assigned on a value-of-service basis in accordance with the non-cost factors of Section 3622 (b)(3).

Although the Postal Service complied with the three-cost configuration in the present case, it continues to believe that the result of such compliance will deprive it and the Commission of the pricing flexibility that Congress intended them to have when it specified, in Section 3622(b), eight non-cost factors for the Commission to consider in addition to the cost factor of Section 3622(b)(3). The Postal Service believes that this loss of flexibility will make it difficult to provide the public with diverse postal services at reasonable rates, as Congress intended.[4] Barring a complete change of course by the court of appeals, this Court is the only forum for judicial relief. In the meantime, the Postal Service is of the view that it cannot responsibly ignore the court of appeals' approach in setting future rates, for that court's almost-

[4] Indeed, the court of appeals conceded that its approach, unlike that of the Commission rejected in *NAGCP I*, would not maximize the efficient allocation of resources (Pet. App. A26-A27).

certain disapproval of any rates not promulgated in accordance with the principles announced in *NAGCP I* would throw the entire postal rate picture into uncertainty.

2. The essence of petitioners' position is that *NAGCP I* was wrongly decided. See 79-377 Pet. 15-19; 79-378 Pet. 14-18; 79-379 Pet. 8-15. For the reasons stated above, the Postal Service agrees.[5] By imposing on the Commission and the Governors a cost methodology that is inferior to the one they originally adopted and still prefer, *NAGCP I* unduly restricted the statutory authority of the Commission and the Governors to set postal rates.

NAGCP I, however, is not before this Court. The decision in the present case, although it adheres to the principles established in *NAGCP I*, is a separate decision that upholds certain rates set by the Commission and approved by the Governors. Those rates were determined in light of *NAGCP I*, and although the Commission and the Governors had misgivings about the wisdom of their compelled course,[6] the Postal Service defended the rates, and the methodology used to arrive at them, as lawful in the court of appeals.[7]

[5] The government did not seek review of *NAGCP I* in this Court because the rates involved there had been superseded by newer rates and thus the question presented had, in our opinion, become moot.

[6] See Pet. App. B6.

[7] In the court of appeals, the Postal Service defended the rates as "an appropriate response to *NAGCP* I" and based on "substantial evidence" (Br. 11; footnote omitted; see also Br.

Thus, in our view, the postal rates now subject to review are not contrary to the statute. The methodology employed is within the statute, in the sense that, had the postal authorities originally devised it, the resulting rates would be lawful.[8] The fact that USPS and the Commission adopted the methodology, and set the rates, based on the court of appeals' construction of the statute rather than their own does

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39). Perhaps most significant, USPS argued to the court of appeals that the administrative decision—specifically including the cost-allocation aspect of those decisions—were consistent with the Postal Reorganization Act as interpreted in *NAGCP I*. (Br. 9, 59-60). In this regard, USPS stated (Br. 59-60; footnotes and citations omitted):

> Agency actions are subject to judicial review. Judicial actions on review are not thereafter subject to agency review. Although an agency's construction of technical terms in a statute may be entitled to deference from the court, it is for the court to decide whether or not the agency has correctly applied the statute. The Court's *NAGCP* I decision, that the Commission had not correctly applied the Act in Docket No. R74-1 and directing the Commission how the Act should be applied, is now the law. The Court having interpreted the Act, it is beyond the Commission's power to re-interpret it.

And USPS concluded its brief by stating (Br. 74):

> The theory and application of service-related costing are a rational implementation of the *NAGCP* I interpretation * * *, an interpretation which binds the Commission and the Postal Service. The specifics of service-related costing were exhaustively tested on the record.
>
> Nor do [petitioners'] exaggerated legal constructions demonstrate that the decisions of the Commission and the Governors were outside the scope of their discretion and the applicable law.

[8] See Pet. App. A28-A46; NAGCP Br. in Opp. 14-18.

not make the methodology, or the rates, any the less lawful.

Although the Postal Service continues to believe that the methodology dictated by *NAGCP I* is not the only methodology the statute allows and that it and the Commission should be free to utilize the discretion that Congress entrusted to them, it sees no reasonable likelihood that the court of appeals, in future rate proceedings, will retreat from the principles it announced there and reiterated here. The Postal Service is thus faced with two equally unattractive alternatives. It may continue to set rates in accordance with principles that it finds unacceptable (albeit lawful), or it may set rates that will almost certainly be struck down by the court of appeals, thus jeopardizing a complex and comprehensive postal rate scheme that involves billions of dollars annually. Whatever course the Postal Service may choose in the future, however, the fact remains that the rates petitioners challenge are lawful, and the government therefore cannot acquiesce in petitioners' suggestion that this Court review and, ultimately, overturn them.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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